

INSIGHTS

## Fifth Circuit Upholds Arbitration Agreement Prohibiting Employee Collective or Class Action Claims

December 5, 2013

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On Tuesday, the U.S. Court of Appeals for the Fifth Circuit joined the Second, Eighth and Ninth Circuits in upholding a class action waiver in an employment arbitration agreement. This is an important victory for employers in managing risks associated with collective or class action claims.

In *D.R. Horton, Inc. v. NLRB*, No. 12-60031, the Fifth Circuit partially overturned a January 3, 2012, National Labor Relations Board (NLRB) decision that the challenged arbitration agreement violated Section 8(a)(1) of the National Labor Relations Act (NLRA) because: (1) the waiver of collective and class action claims infringed on employees' Section 7 rights to engage in concerted activities protected by the NLRA; and (2) the arbitration agreement could be reasonably interpreted to prohibit an employee's right to file an unfair labor practice charge with the NLRB. The Fifth Circuit reversed the NLRB's holding on the first ground but upheld it on the second.

In so doing, the Court relied on the Federal Arbitration Act (FAA), which generally requires that arbitration agreements be enforced according to their terms, subject to limited exceptions. The Fifth Circuit found that no applicable exceptions in this case.

In affirming the NLRB's ground for its holding, the Court noted that "the Arbitration Agreement could be misconstrued" to preclude unfair labor practice charges filed with the NLRB. The challenged D.R. Horton arbitration agreement used extremely broad language that required all disputes to be settled by arbitration with four exceptions. Because filing an unfair labor practice charge with the NLRB was not one of those express exceptions, the court found that a reasonable employee could read the arbitration agreement as precluding the right to file a charge with the NLRB.

The court upheld the NLRB's decision that the agreement must be rewritten to allow expressly for a charge to be filed with the NLRB.

The NLRB may request *en banc* review by the Fifth Circuit and file a petition to review the Fifth Circuit's ruling with the Supreme Court of the United States.

**Bottom Line**

The Fifth Circuit's decision makes arbitration agreements more attractive, as they may preclude not only individual but also collective or class action claims. Especially as the number of FLSA collective actions has dramatically increased, an arbitration agreement with a class and collective action waiver may substantially minimize an employer's potential liability as well as much of the substantial time and expense of defending against such claims in court proceedings.

Employers who do not regularly enter into an arbitration agreement with their employees, or who have agreements that do not prohibit class actions, should consider doing so because it may reduce the risk associated with class action claims. However, the agreement should explicitly state that employees are not waiving their right to file a charge with the NLRB.